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IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS d/b/a REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Petitioners,

—v.—

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, in their official capacities,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Undue Burden Standard Requires an Independent Judicial Inquiry Into Whether a Health-Justified Abortion Regulation Actually Serves the State's Interest in Women's Health. 5

A. *Casey* Places Important, But Different, Limitations on Permissible Means of Serving the Valid Interests in Potential Life and Women's Health. 7

B. Independent Judicial Review of Health-Justified Restrictions Protects the Decisional Right *Casey* Recognizes. 13

C. Independent Judicial Review of Health-Justified Restrictions Informs the Undue Burden Inquiry. 15

D. *Carhart* Does Not Support the Fifth Circuit's Rational Speculation Review. 21

E. Courts Often Conduct Independent Review of Fit to Preserve Constitutional Limits 26

II. If the Plaintiff Shows that a Health-Justified Abortion Regulation Targets Abortion Only, the Burden Should Shift to the Government to Prove that the Regulation Actually Promotes the Interest in Women's Health. 28

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Dolan v. City of Tigard,
512 U.S. 374 (1994). 27, 31

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496 U.S. 72 (1990) 27

Entergy Nuclear Vermont Yankee, LLC v. Shumlin,
733 F.3d 393 (2d Cir. 2013).....27

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545 U.S. 469 (2005). 26, 27

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413 U.S. 189 (1973) 4

Koontz v. St. Johns River Water Mgmt.,
13 S. Ct. 2586 (2013). 27

Mazurek v. Armstrong,
520 U.S. 968 (1997) 25, 26

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission,
461 U.S. 190 (1983). 27

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 12,13

Planned Parenthood v. Strange,
9 F. Supp.3d 1272 (M.D. Ala. 2014) 5,19

Planned Parenthood v. Strange,
33 F Supp.3d 1330 (M.D. Ala. 2014). 5

Planned Parenthood Ariz., Inc. v. Humble,
753 F.3d 905 (9th Cir. 2014) 19, 20, 22

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott II),
748 F.3d 583 (5th Cir. 2014) 21, 23, 24

Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.,
865 N.W.2d 252 (Iowa 2015) 20

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94 F. Supp. 3d 949 (W.D. Wisc. 2015),
aff'd sub nom, Planned Parenthood of Wisc. v. Schimel, 806 F.3d 908 (7th Cir. 2015).....2, 17

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738 F.3d 786 (7th Cir. 2014) 19

Planned Parenthood of Wis. v. Schimel,
806 F.3d 908 (7th Cir. 2015). 16, 17, 18

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410 U.S. 113 (1973). 5, 6, 9, 11

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518 U.S. 515
(1996) 30

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granted, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274) 21, 24, 25

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Teresa Stanton Collett, *Previability Abortion and the Pain of the Unborn*, 71 WASH. & LEE L. REV. 1211 (2014). 14

Steven Ertelt, *Abortion has Caused 300K Breast Cancer Deaths Since Roe*, LIFENEWS (Jan. 17, 2011, 4:44 PM), http://www.lifenews. com/2011/01/17/abortion-has-caused-300k-breast-cancer-deaths-since-roe/ 13, 14

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Information Society Project (ISP) at Yale Law School,[2] an intellectual center exploring the implications of new technologies for law and society. The ISP focuses on a wide range of issues such as the intersections between the regulation and dissemination of information, health policy, privacy concerns, First Amendment and reproductive rights jurisprudence, and technology policy. Many of the scholars associated with the ISP have special expertise in First, Fourth and Fourteenth Amendment jurisprudence and share an interest in ensuring that the constitutionality of abortion regulations is determined in accordance with settled Fourteenth Amendment principles.

SUMMARY OF ARGUMENT

Rather than communicating the state's preference for childbirth over abortion by attempting to dissuade women from obtaining abortions, the State of Texas has enacted regulations that, if upheld, will restrict access to abortion by closing more than 75% of abortion clinics in Texas.[3] These

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[1] Written consent to file this brief was obtained from both parties pursuant to S. Ct. Rule 37 and accompanies the filing of this brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

[3] Letter from Stephanie Toti to U.S. Court of Appeals for the Fifth Circuit (Jun 12, 2015), JA 1429-34.

regulations are part of a new generation of abortion restrictions that single out abortion for onerous requirements that the state justifies on health grounds, but that are neither imposed on other medical procedures of comparable risk, nor reflect generally accepted medical practice.[4] The State of Texas claims these regulations promote the state's interest in women's health, but trial courts, in this case and other similar cases, held that the evidence of a link between the regulations and health is "feeble," "weak," "tenous," and "speculative."[5] A fundamental question here is whether the trial courts' findings matter or whether, as the Fifth Circuit held below, courts should defer entirely to a State's claim that restrictions further the interest in health, transforming the undue burden standard announced in *Planned Parenthood v. Casey*[6] into the rational basis review advocated by the dissenters.[7]

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[4] *See, e.g.*, Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, §§ 1–12, 2013 Tex. Sess. Law Serv. 4795-802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-.048, 171.061-.064, & amending §§ 245.010-.011; TEX. OCC. CODE amending §§ 164.052 & 164.055).

[5] *Whole Woman's Health v. Lakey*, 46 F. Supp.3d 673, 684 (W.D. Tex. 2014) (concluding that the State of Texas' primary interest in health is "misplaced" and that the State's concerns are "largely unfounded and are without a reliable basis."), *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274). *See also Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F.Supp.3d 949, 980 (W.D. Wisc. 2015) (finding "tenuous link, if any, between the proffered justifications and the State's evidence").

[6] 505 U.S. 833 (1992).

[7] *Id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that "[a] woman's interest in having an

This Court should reject the Fifth Circuit's radical position and reaffirm *Casey's* balance.

First, *Casey's* undue burden standard, its text, application in *Casey* and *Gonzales v. Carhart,*[8] and its logic—the balance it struck between the woman's "free choice"[9] and the state's interest in promoting potential life over childbirth—requires courts to independently examine whether a health-justified abortion restriction actually serves the state's asserted health interests. A regulation that does not actually promote women's health, but instead promotes an interest in potential life by shuttering clinics, thus hindering the woman's decision rather than informing it, is invalid under *Casey* and *Carhart.*[10] Failure to serve the health interest entirely or a weak connection between the restriction and the health interest is relevant to both the purpose and effects prongs of the undue burden standard. The Fifth Circuit's approach mandating extreme judicial deference is inconsistent with the Supreme Court's decisions in *Casey* and *Carhart* and must be rejected.

Second, this Court should clarify the order of proof required by *Casey* to guide review of health-justified, as opposed to potential life-justified,

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abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.").

[8] 550 U.S. 124, 146 (2007).

[9] *Casey*, 505 U.S. at 877.

[10] *Id.* The determination of health fit is relevant to both the purpose and effects prongs of *Casey*'s undue burden standard. *See infra* at II.C.

abortion restrictions.[11] The balance *Casey* struck and the general considerations of "policy and fairness" that guide allocations of burdens of proof[12] require that if the plaintiff first shows that the health-justified regulations target abortion alone, imposing restrictions on its provision that do not apply to procedures of comparable risk "as with any medical procedure,"[13] the inference is raised under *Casey* that the regulation was not designed to promote women's health, and that it instead invalidly promotes life by hindering the woman's decision, rather than informing it. In such a case, the burden of proof shifts to the government to prove that health-justified abortion regulations actually serve the state's valid interest in women's health, despite being applied only to abortion.[14] If the health-justified regulation on the other hand is similar to those that apply to procedures of comparable risk, the burden of proof remains with the plaintiff to prove that despite the comparability of the regulation it nonetheless fails to promote the interest in health, or that it has the purpose or the

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[11] The order of proof is different for health-justified regulations than potential life-justified ones.

[12] *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940)). *See also* Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in* Dolan v. City of Tigard, 71 N.Y.U. L. REV. 1301 (1996); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 255 (1988).

[13] *Casey*, 505 U.S. at 878 (allowing "*as with any medical procedure*, the State may enact regulations to further the health or safety of a woman seeking an abortion") (emphasis added).

[14] *See Casey*, 505 U.S. at 878.

effect of imposing an undue burden on the woman's "free choice." Clarifying the order of proof in this way will reduce uncertainty in the doctrine, increase the quality of judicial factfinding, and best maintain the balance *Casey* struck.

ARGUMENT

I. The Undue Burden Standard Requires an Independent Judicial Inquiry Into Whether a Health-Justified Abortion Regulation Actually Serves the State's Interest in Women's Health.

As this Court recognized in *Carhart*, *Casey* struck a balance[15] between the woman's right to obtain a previability abortion announced in *Roe v. Wade*[16] and the state's interest in protecting potential life, also acknowledged in Roe.[17] While the Justices preserved the core of *Roe's* protections,[18] the

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[15] *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("*Casey*, in short, struck a balance. The balance was central to its holding."). *See generally* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. – (forthcoming 2016) (exploring *Casey* logic and rationale); Priscilla J. Smith, *If the Purpose Fits: the Two Functions of Casey's Purpose Inquiry*, 71 WASH. & LEE L. REV. 1135, 1140-43 (2014) (discussing Casey's "middle ground"); *Planned Parenthood v. Strange* (*Strange II*), 33 F Supp.3d 1330, 1337–38 (M.D. Ala. 2014) (undue burden standard is "middle ground" between strict-scrutiny and rational basis review) (quoting *Planned Parenthood v. Strange*, 9 F. Supp. 3d 1272, 1282 (M.D. Ala. 2014)).

[16] 410 U.S. 113 (1973).

[17] *Id.* at 163 (acknowledging important interest in potential life); *id.* at 159 ("The pregnant woman cannot be isolated in her privacy.").

[18] *See Casey*, 505 U.S. at 869–74. *See also id.* at 856; *id.* at 852 (recognizing that the abortion decision "originate[s] within the

Court emphasized that the portion of *Roe* that "speaks with clarity in establishing . . . the State's 'important and legitimate interest in potential life,' . . . has been given too little acknowledgment and implementation by the Court in its subsequent cases."[19] To expand opportunities for state regulation to further the "profound interest in potential life,"[20] the Court abandoned strict scrutiny review and the "rigid trimester framework" allowing regulation furthering this interest throughout pregnancy.[21] The Court made clear that:

> [r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[22]

Importantly, the Court also declined to adopt the rational relationship test advocated by Chief Justice Rehnquist in dissent.[23] From now on, the "undue

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zone of conscience and belief"); *id.* at 850 (recognizing that "men and women of good conscience can disagree").

[19] *Casey*, 505 U.S. at 871 (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

[20] *Id.* at 878.

[21] The Court directly overruled those portions of *Akron* and *Thornburgh* that struck down laws imposing a mandatory delay and requiring provision of state-mandated information before a woman could have an abortion. *See id.* at 883.

[22] *See e.g.*, *Casey*, 505 U.S. at 877; *Gonzales*, 550 U.S. at 157–58 (holding law properly promoted respect for life).

[23] *See Casey*, 505 U.S. at 845 (distinguishing analysis from that the rational relationship test advocated by Chief Justice

burden" standard would govern review of abortion regulation.[24]

The undue burden inquiry requires two inquiries. As the Court wrote:

> And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[25]

Thus, a Court must first determine whether an abortion regulation furthers the interest in potential life or health through permissible means, and second evaluate whether it has the purpose or effect of imposing an undue burden on the woman's choice.

A. *Casey* Places Important, But Different, Limitations on Permissible Means of Serving the Valid Interests in Potential Life and Women's Health.

Different limitations apply within the undue burden framework to potential life-justified restrictions and health-justified restrictions and recognizing the differences is central to maintaining *Casey*'s balance. Reflected here is the notion that there is a special moral valence to abortion that,

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Rehnquist); *cf. id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part).

[24] *Id.* at 878 (plurality opinion) (emphasis added).

[25] Id. at 877.

because it concerns the unborn, warrants special forms of regulation not imposed on other health procedures. But these special forms of regulation are limited to those that seek to vindicate the interest in protecting potential life. The Court does not permit health-justified abortion regulations to function as an *additional* means of protecting the interest in potential life. Instead, *Casey* allows health-justified regulation of abortion where consistent with the ordinary regulation of the practice of medicine. This is because the aspect of abortion that is distinct is the aspect involving potential life, not the medical aspects of the procedure itself. The risks of the abortion procedure itself can be compared with risks of other procedures, apples to apples.

First, to further the interest in potential life, "the means chosen by the State . . . must be calculated to inform the woman's free choice, not hinder it."[26] Moreover, the government must employ modes of persuasion that are consistent with the dignity of women. For example, the Court stressed that information is calculated to inform "free choice" only if it is "truthful and not misleading."[27] Finding that mandatory information requirements and a twenty-four hour waiting period required after receipt of the information were reasonable measures "to ensure an informed choice, one which might

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[26] *Id.* at 877; *id.* at 878 ("[M]easures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

[27] *Id.* at 882–83 (upholding mandatory information and twenty four hour waiting period requirements, noting that "[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

cause the woman to choose childbirth over abortion," the Court upheld these portions of the law.[28] In addition, the Court struck down a spousal notice requirement because persuasion under these conditions perpetuates the husband's historic, but now unconstitutional, forms of authority over his wife, violating the woman's dignity and equality.[29]

Thus, in *Casey*, the Court reaffirmed the Constitution's protection for a woman's decision on whether to carry a pregnancy to term,[30] allowed mandatory imposition of dissuasive methods to influence a woman's decision whether to carry a pregnancy to term in ways that *Roe* had previously barred, and prohibited the government from protecting potential life through dissuasive means that deny women's dignity by, for example, prohibiting the use of false or misleading information or the perpetuation of male authority over women's decisionmaking.

Second, though less attention has been paid to the limitations on the means by which a state may permissibly further its interest in women's health, at least until the recent wave of health-justified abortion regulations, these limitations are also vital to maintaining *Casey's* balance. The joint opinion makes clear that some health-justified regulations

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[28] *Casey*, 505 U.S. at 882–83; *id.* at 885 (upholding mandatory 24 hour delay after receipt of information, and noting that although this presented a closer question, "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable.").

[29] *Id.* at 898.

[30] *Roe*, 410 U.S. at 153.

are permissible throughout pregnancy, while others are not, and invites judges to distinguish between health-justified restrictions enacted "as with other medical procedures"[31] and those that are "unnecessary" [32] or pretextual, i.e., have "no purpose other than to make abortions more difficult."[33]

Indeed, in *Casey* the Court accepts the recordkeeping and reporting requirements at issue primarily because they are consistent with common medical practices.[34] The Court distinguished the health interest from the state's interest in protecting potential life by dissuading women from ending a pregnancy: "*[a]lthough [the requirements] do not relate to the State's interest in informing the woman's choice, they do relate to health.*"[35] The Court then emphasized that "[t]he collection of information with respect to actual patients is a vital element of medical research." Thus, the Court finds that it cannot be said that the "requirement serves no purpose other than to make abortions more difficult."[36] Actual service of the interest in health, which is presumed where the regulation is consistent with general regulation of medicine, is enough to establish a proper purpose of the statute. In other words, regulations that are similar to those applied to procedures of comparable risk, are not suspect.

Previous Court decisions also treated potential life-justified regulations that placed additional

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[31] 505 U.S. at 878.
[32] *Id.*
[33] *Id.* at 900–01.
[34] *Id.*
[35] *Id.*
[36] *Id.*

requirements on abortion to insure a woman's decision was "fully informed" differently from health-justified abortion regulations.[37] For example in a portion of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which *Casey* cites approvingly, the Court upheld a written consent requirement even though written consent did not appear to be universally required for all surgeries.[38] It was targeted at what the Court sees as different about abortion, that it terminates the gestation process, preventing potential life from developing into a person, potential life that many people strongly and sincerely believe has the equivalent moral value of a person. In light of the strong opinions on the issue, the Court has held that the State has a legitimate interest in ensuring the woman's decision is made with "full knowledge of its nature and consequences":

> The decision to abort, indeed, is an important, and often a stressful one,

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[37] Both *Roe* and *Casey* clearly distinguish between the state's interest in protecting women's health and in protecting unborn life. In *Roe*, the Court authorized the state to regulate abortion in the interests of protecting women's health and protecting unborn life at different stages of pregnancy. *Roe*, 410 U.S. at 163–64. While eliminating the trimester framework and authorizing government regulation promoting each of these interests throughout pregnancy, *Casey* continues to treat the two state interests as analytically distinct. *Casey*, 505 U.S. at 878–79.

[38] The Court noted that with minor exceptions, no other statute required written consents to surgery, and was unconcerned with contentions that obtaining written consent was a general practice. It was enough to the Court that the consent was targeted to the special circumstance of insuring women were fully informed of what they were doing. *Danforth*, 428 U.S. at 67.

> and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent. [39]

This deference on the issue of obtaining proper informed consent was not mirrored in the Court's extensive review of the evidence presented to support the State's ban on a particular method of abortions, saline abortions. At that time, before more modern second trimester methods developed, the Court struck down the ban after finding:

> particularly in the light of the present unavailability as demonstrated by the record of the prostaglandin technique, the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12

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[39] *Danforth*, 428 U.S. at 67; *see also id.* ("We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.").

weeks."[40]

B. Independent Judicial Review of Health-Justified Restrictions Protects the Decisional Right *Casey* Recognizes.

The logic of *Casey/Carhart* cautions against conflating the interest in potential life and the interest in women's health. The deference that the Court extends to the state's interest in protecting potential life, accepting a persuasive regulation as long as it informs choice and does not violate dignity, *see supra*, does not logically extend to the state's interest in regulating abortion to protect women's health.

The difficulty currently facing courts reviewing the permissibility of a health-justified abortion regulation is that the state can always *claim* that it intends to promote women's health to justify a given restriction even where the claim is contradicted by science, and many who are motivated by strong good-faith moral opposition will support them. Indeed, the ease of hiding motive is great in contentious fields like abortion where one can always find an expert willing to testify to scientifically refuted facts, like that abortion causes breast cancer,[41] that abortion causes suicidality,[42] or that a

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[40] *Id.* at 78–79.

[41] *Compare Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. (last updated Jan. 12, 2010), http://www.cancer.gov/cancertopics/ factsheet/Risk/abortion-miscarriage (last visited Feb. 4, 2014) (reporting that expert panel of National Cancer Institute (NCI) "concluded that having an abortion or miscarriage does not increase a woman's

fetus at twenty weeks feels pain.[43] If *Casey*'s rejection of rational basis scrutiny[44] is to mean anything, it must require more than bald speculation by the state that a regulation serves an interest in maternal health. To ensure that *Casey*'s standard is met, that the law in fact serves a valid health interest of sufficient importance to warrant any

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subsequent risk of developing breast cancer"), *with* Steven Ertelt, *Abortion has Caused 300K Breast Cancer Deaths Since Roe*, LIFENEWS (Jan. 17, 2011, 4:44 PM), http://www.lifenews.com/2011/01/17/abortion-has-caused-300k-breast-cancer-deaths-since-roe/ (last visited Feb. 4, 2014).

[42] *Compare* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 6 (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf (noting that evidence indicates that the relative risk of mental health problems due to an abortion is similar to the risk associated with an unplanned pregnancy; risk increases in certain limited circumstances) *and* Gonzales v. Carhart, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting), *with* Steven Ertelt, *Abortions Cause Severe Depression for Women, New Study Shows*, LIFENEWS (Jan. 2, 2006, 9:00 AM), http://www.lifenews.com/2006/01/02/nat-1941/ (last visited Feb. 4, 2014) (reporting that a New Zealand study found women who had abortions to be more likely to become severely depressed).

[43] *Compare* Susan J. Lee, et al., *Fetal Pain: A Systematic Multidisciplinary Review of Evidence*, 294 J. AM. MED. ASS'N 947, 947–54 (2005) ("[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester" and "probably does not exist before twenty-nine or thirty weeks"), *with* Teresa Stanton Collett, *Previability Abortion and the Pain of the Unborn*, 71 WASH. & LEE L. REV. 1211 (2014).

[44] *See Casey*, 505 U.S. at 874 (1992) (adopting the undue burden standard despite Chief Justice Rehnquist's argument in dissent); *id.* at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing in dissent that "the Constitution does not subject state abortion regulations to heightened scrutiny").

burden it creates, courts must look behind these claims and conduct independent judicial inquiry into whether health-justified restrictions on abortion in fact serve health-related ends and do not instead protect potential life by unconstitutional means, without attempting to reason with women about their decision.

Singling out abortion for onerous regulation not applied to other medical procedures of similar risk is suspect in the *Casey* framework, both because it is regulation that is inconsistent with ordinary medical practice, unlike the health regulations that have been upheld before and that *Casey* authorizes, and because casting a regulation as health-justified could, without confirmation that it is health-justified, allow a state to do an end-run around the limitations on potential life-justified restrictions.

C. Independent Judicial Review of Health-Justified Restrictions Informs the Undue Burden Inquiry.

As noted above, the Court held that even if an abortion regulation furthers a valid state interest in potential life or health, it is still impermissible if it has the purpose or effect of imposing an "undue burden" on the woman's decision.[45] The Court allows regulation that actually promotes health, even if the

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[45] *Id.* at 877 (noting "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional); *id.* at 878 ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.").

health regulation had the incidental effect of increasing abortion's cost "by a slight amount," reserving the question of the conditions under which increased costs become a substantial obstacle,[46] when the burden becomes undue.

Courts outside the Fifth Circuit, including the Seventh and Ninth Circuits, recognize that the existence and extent of the relationship between a health-justified regulation and the interest in women's health informs the undue burden inquiry in two ways. First, unequal application of health restrictions, singling out abortion or a weak factual basis for the health interest asserted, may supply objective evidence of a purpose to impose a substantial obstacle, in other words a purpose to serve the interest in potential life with invalid means, by hindering women seeking abortions.[47] Inconsistent conduct, singling out abortion, or weak factual support for the restriction can supply objective evidence of unconstitutional purpose. As Judge Posner noted:

> Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency. A number of other

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[46] *Id.* at 900–01.

[47] *See e.g., Planned Parenthood of Wis. Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) at *13 ("A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere"); *id.* at 6 (citing case of colonoscopies in particular where rate of complications resulting in hospitalization is four times that of 1st trimester abortion).

> medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.[48]

The district court judge reviewing Wisconsin's admitting-privileges law, despite "being highly reticent to presume both for personal and public policy reasons to discern the 'collective intent' of another branch of government, even in the face of an almost completely one-sided record," held that the "Act's purpose was to prevent women from accessing abortion," and found the case to be an "extreme" one.[49] The court rested this judgment on classic indicia of pretext: a) the legislative record was "devoid of *any* medical rationale";[50] b) there was a "tenuous link, if any" between the health justifications and the evidence presented at trial;[51] c) the law targeted abortion providers without similarly regulating procedures of comparable or greater risk,[52] and d) the law gave plaintiffs no time to

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[48] *Schimel*, 806 F.3d. at 921 ("Wisconsin appears to be indifferent to complications of any other outpatient procedures, even when they are far more likely to produce complications than abortions are.").

[49] *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F.Supp.3d 949, 995 (W.D. Wis. 2015), aff'd sub nom *Planned Parenthood of Wis. V. Schimel*, 806 F.3d 308 (7th Cir. 2015).

[50] *Id.* (finding legislative record "devoid of *any* medical rationale for the bill," opposition by all Wisconsin medical organizations, and that "any assertion that the impact on health overall would be positive was dubious from the beginning").

[51] *Id.* at 980.

[52] *Id.* (noting law "inexplicably singles out abortion when evidence shows abortion "is at least as safe as, and often much

attempt to comply with the rules, showing an intent to cripple the clinics.[53]

Similarly, the district court in this case criticized the state for attempting to supplement health-protective justifications with fetal-protective justifications, reasoning that under *Casey* it was unconstitutional for the state to protect unborn life by creating "obstacles to previability abortion" rather than by counseling against the decision to seek an abortion. The ambulatory surgical center requirement, the court found, "was intended to close existing licensed abortion clinics."[54]

Second, the strength of the evidentiary showing that the regulation actually serves an interest in women's health is relevant to determining whether any burden on abortion created by the regulation was "undue." As Judge Posner wrote for the Seventh Circuit:

> The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an "undue burden" on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if

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safer than, other outpatient procedures" not similarly regulated).

[53] *Id.* at 995 (noting plaintiffs given only two days to comply with the requirement as showing intent to cripple clinics).

[54] *Whole Woman's Health v. Lakey*, 46 F. Supp.3d at 685.

> slight, to be "undue" in the sense of disproportionate or gratuitous.[55]

Similarly, in examining health-justified regulations mandating the use of outdated protocols for medication abortion in *Planned Parenthood of Arizona v. Humble*,[56] the Ninth Circuit relied on *Casey's* "unnecessary health regulations language" in applying a weighted balancing test, reasoning that "the more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test; conversely, the stronger the state's justification, the greater the burden may be before it becomes 'undue.'"[57] The court noted "Arizona has introduced no evidence that the law

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[55] *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (citations omitted) (citing *Casey* and *Mazurek v. Armstrong*, 520 U.S. 969 (1997)). *See also id.* (finding in the case of the admitting privileges requirement before it that the medical evidence was "feeble," while "the burden [was] great."); *id.* at 789 (requirement would shut down two of state's four abortion clinics).

[56] 753 F.3d 905 (9th Cir. 2014).

[57] *Id.* at 912 (observing "in the context of a law purporting to promote maternal health, a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions *and* fail to serve the purported interest very closely, or at all") (internal quotations omitted). *See also Strange I*, 9 F. Supp.3d at 1296 (in reviewing an admitting privileges requirement, holding "it is not enough to simply note that the State has a legitimate interest; courts must also examine the weight of the asserted interest, including the extent to which the regulation in question would actually serve that interest.") (citing *Van Hollen*); *id.* at 1296–97 ("the court . . . determines whether the obstacle is more significant than is warranted by the justifications.") (citing *Van Hollen*); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015).

advances in any way its interest in women's health."[58] In this case, where there is similarly "tangential," "weak," or "speculative" evidence that either restriction actually serves women's health,[59] and overwhelming evidence that the only impact of the regulations is to close clinics unnecessarily, the burden is "undue."

A weighted balancing test of this kind faithfully implements *Casey*'s directions to judges to distinguish between necessary and unnecessary health regulations.[60] Undue means unwarranted, disproportionate. Undue is a *relative* judgment. The question of what adverse effects are "undue" depends on the strength of the state's demonstration of a health justification for the restriction on abortion—on whether and to what extent a restriction is necessary to protect women's health.

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[58] *Humble*, 753 F.3d at 916. The court found "Here, the 'medical grounds thus far presented' are not merely 'feeble.' They are non-existent." *Id.* at 917.

[59] *E.g.*, *Lakey*, 46 F. Supp.3d at 684 (ASC requirements "have such a tangential relationship to patients safety as to be nearly arbitrary"); *id.* at 685 ("[a]t most, the court finds the credentialing rationale weak and speculative").

[60] *See Casey*, 505 U.S. at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."). The Ninth Circuit similarly justifies the weighted balancing test it employs to enforce *Casey* as following from the Court's instructions to bar "undue" burdens and "unnecessary" health regulations. Planned *Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912–13 (9th Cir. 2014).

D. *Carhart* Does Not Support the Fifth Circuit's Rational Speculation Review.

To justify its use of hyper-deferential rational basis review,[61] the Fifth Circuit invokes *Gonzales v. Carhart*, the Supreme Court's 2007 decision that upheld the federal Partial Birth Abortion Ban Act. But the Fifth Circuit's hyper-deferential rational basis review is inconsistent with the Court's decision in *Carhart*, and eliminates the crucial distinction between the state's interests in protecting potential life and its interest in women's health, thereby permitting Texas to violate the limitations *Casey* imposes on the means by which the state may protect unborn life.

In the Supreme Court's opinion in *Gonzales v. Carhart*,[62] issued fifteen years after *Casey*, the Court accepted the continuing authority of *Casey*'s undue

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[61] The Fifth Circuit's claims about rational basis are not entirely clear. *See* Greenhouse and Siegel, *Clinic* Closings, at Part II.C.1. (discussing Judge Jones' opinion in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583 (5th Cir. 2014), Judge Elrod's opinion in *Whole Woman's Health v. Lakey*, 769 F.3d 285, 304–05 (5th Cir. 2014) (overturning District Court injunction against Texas ambulatory-surgical-center requirement), *vacated in part*, 135 S. Ct. 399 (2014), and the *per curiam* opinion in *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274), which goes out of its way to reaffirm *Abbott II*'s rational basis reasoning. Whichever account the Circuit embraces, its rational-basis claims flout both *Casey* and *Carhart*).

[62] 550 U.S. 124 (2007).

burden framework[63] and the protection it provides for a woman's choice in obtaining previability abortions.[64] In addition, the Court declined the government's call to defer categorically to claims supporting the legislation made in Congressional Findings of Fact. Instead, in upholding the Partial Birth Abortion Ban Act, the Court observed, "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. . . . Uncritical deference to Congress' factual findings in these cases is inappropriate."[65] The *Carhart* Court probed and, in two instances, rejected congressional findings invoked by the government as reasons for enacting the Partial Birth

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[63] *See id.* at 146 (observing that *Casey*'s undue burden standard "struck a balance" between protecting "the woman's exercise of the right to choose" and the ability of the state to "express profound respect for the life of the unborn" (quoting *Casey*, 505 U.S. at 877)); *see also id.* ("*Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the case at bar").

[64] *Id.* at 153–54 (construing the statute to avoid constitutional questions and protect ordinary second-trimester abortions). *See* Smith, Priscilla J., *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. (Online), (2008), *available* at http://ssrn.com/abstract=1357506 (noting that decision upholding statute preserved viability of *Casey's* framework while rejecting plaintiffs' claim that there was a significant medical distinction between banned procedures and allowable procedures).

[65] 550 U.S. at 165–66 (2007) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.") (quoting *Crowell v. Benson*, 285 U.S. 22, 60 (1932)); *see also Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (discussing *Carhart*).

Abortion Ban Act.[66] Probing Congress's reasons behind enacting the challenged statute is not minimal rational basis review of the kind that the Fifth Circuit mandates.[67]

Moreover, *Carhart* did not concern a health-justified abortion regulation. Instead, that case concerned a potential life-justified law that the Court held furthered the interest in protecting the "integrity and ethics of the medical profession."[68] The law as construed by the Court concerned a rarely employed method of performing abortions late in the second-trimester of pregnancy. The Court held that due to the availability of alternative safe

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[66] *Carhart*, 550 U.S. at 165-66 (drawing on evidence presented in the district courts to reject the claim that no medical schools provided training in the abortion method the statute banned, and the claim that "the prohibited procedure is never medically necessary."). Moreover, despite the legislative finding that "partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives," Partial Birth Abortion Ban Act of 2003, Pub. L. 108–105, at § 2(2) (Nov. 5, 2003), the Court did not consider that the statute might be health-justified.

[67] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 594 (5th Cir. 2014) (citations omitted) (("[a] law 'based on rational speculation unsupported by evidence or empirical data' satisfies rational basis review.").

[68] 550 U.S. at 157. By banning a procedure that had a "disturbing similarity to the killing of a new born infant," and which "implicate[d] additional ethical and moral concerns that justif[ied] a special prohibition," the Court held that the law furthered the government's "legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn." *Id.* at 158 (law "'draw[s] a bright line that clearly distinguishes abortion and infanticide.'") (internal citations omitted).

abortion procedures, the law did not restrict any woman's access to abortion before viability.[69] Both references to "rational basis" and regulation being within "legislative competence" in *Carhart*[70] are carefully limited to the specific context at issue there, a law involving the substitution of one procedure for another where only "marginal safety" considerations separated the two.[71] *Carhart's* statements about a potential life-justified regulation simply do not apply to the health-justified regulations here that would shut down three quarters of the clinics in the state of Texas.

Nor does the language in *Carhart* discussing the "wide discretion" that state and federal legislatures have to pass legislation in areas where there is medical and scientific uncertainty,"[72] support the Fifth Circuit's call for judicial deference in this case.[73] The condition of medical uncertainty in *Carhart* is unrelated to the question of whether the law promoted women's health. It related to the

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[69] *Carhart*, 550 U.S. at 154-56.

[70] *Id.* at 158; *cf. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 590 (5th Cir. 2014) (characterizing *Carhart* as "holding that the State may ban certain abortion procedures and substitute others provided that 'it has a rational basis to act, *and* it does not impose an undue burden'" (quoting *Carhart*, 550 U.S. at 158)).

[71] See Carhart, 550 U.S. at 158, 166.

[72] *Id.* at 163.

[73] *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (chastising the trial court for "substituting its own judgment for that of the legislature" and asserting "medical uncertainty underlying a statute is for resolution by legislatures, not the courts"), *mandate stayed pending judgment by* 135 S. Ct. 2923, *and cert. granted*, 2015 WL 5176368 (U.S. Nov. 13, 2015) (No. 15-274).

question of whether health was endangered enough by the law in certain circumstance to require an exception to the ban where the woman's health was at risk. Moreover, the fact of medical uncertainty was itself established through extensive and detailed judicial review, through the fact finding of the District Courts. By contrast, the Fifth Circuit finds uncertainty by *ignoring* the fact-finding of the District Court.[74] If appellate courts can justify deference to the legislature by invoking medical uncertainty that is untethered to facts found and credibility determinations made by the trial court,[75] they can easily erode protections for constitutional rights. Whatever deference *Carhart* might be read to warrant on the issue of promotion of the interest in potential life, it cannot be the extravagant deference to the legislature that the Fifth Circuit practices here.[76]

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[74] *See Cole*, 790 F.3d at 587 (explaining why *Abbott II* "disavowed the inquiry employed by the district court" to evaluate admitting privileges requirement); see *id.* at 584–86 (same with reference to ASC requirement).

[75] The District Court found that the testimony of the state's key expert witnesses lacked "the appearance of objectivity and reliability" because a non-physician third party exerted "considerable editorial control" over the contents. *Lakey*, 46 F. Supp.3d at 680 n.3. In finding "medical uncertainty," the Fifth Circuit rejected the findings of the District Court and endorsed the state's evidence without ever mentioning adverse credibility findings made by Judge Yeakel. *See Cole*, 790 F.3d at 585 (5th Cir. 2015).

[76] Nor does *Mazurek v. Armstrong*, 520 U.S. 968 (1997), support the Fifth Circuit's position. In a brief *per curiam* opinion, that case upheld a Montana law providing that only a doctor could perform an abortion. The Court noted that physician-only requirements of various kinds had been sustained in its prior cases, including both *Roe* and *Casey*. *Id.* at 973–74

E. Courts Often Conduct Independent Review of Fit to Preserve Constitutional Limits.

Courts often examine the evidence to determine whether a statute *actually* serves a valid interest in order to preserve limitations of a constitutional rule. For example, courts examine the means/ends fit in the context of takings under eminent domain powers. The government may not take property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." [77] The disposition of these cases, therefore, "turns on the question whether the City's development plan serves a 'public purpose.'"[78] Even in applying "meaningful" rational basis review under the Public Use Clause, one Justice emphasized that a detailed review of legislative motivation is required to ascertain whether an illegitimate purpose is

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(emphasizing that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others" (emphasis omitted) (quoting *Casey*, 505 U.S. at 885)). As the regulation at issue in *Mazurek* would not force any woman to travel to a different facility, the Court judged its effects minimal. *Id.* The Court declined to find Montana's physician-only requirement unconstitutional in purpose in light of: the Supreme Court's several cases sanctioning physician-only requirements, the requirement's minimal effects on abortion access, and the fact that similar rules existed in forty other states. *Id.* at 973.

[77] *Kelo v. City of New London*, 545 U.S. 469, 477–78 (2005).

[78] *Id.* at 480.

animating state takings using eminent domain power.[79]

Similarly, in preemption cases, courts frequently conduct detailed evaluations of legislative purpose by combining evaluation of whether legislation serves its intended purpose with inquiries into subjective legislative intent. For example, in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*,[80] "the Court carefully analyzed the congressional enactments relating to the nuclear industry in order to decide whether a California law that conditioned the construction of a nuclear power plant on a state agency's approval of the plant's nuclear-waste storage and disposal facilities fell within a pre-empted field."[81] The Court conducts a similar analysis under Fifth Amendment exactions doctrine, a doctrine that seeks to balance individual property rights against the government's legitimate important interest in mitigation of the impact of a proposed development on the public. *Koontz v. St. Johns River Water Mgmt.*, 13 S. Ct. 2586, 2595 (2013). *See also Dolan v. City of Tigard*, 512 U.S.

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[79] *See id.* at 491–92 (Kennedy, J., concurring) (noting that the trial court reviewed evidence from six different sources before concluding that benefitting a private company was not "the primary motivation or effect of this development plan" (internal quotation marks omitted)); *see also id.* at 497 ("[a]n external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.").

[80] 461 U.S. 190 (1983).

[81] *English v. Gen. Elec. Co.*, 496 U.S. 72, 80 (1990) (discussing *Pacific Gas*). *See also Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

374, 391-93 (1994) (conducting searching inquiry into state's asserted interests and finding state did not show why public rather than private greenway was required in the interest of flood control).

II. If the Plaintiff Shows that a Health-Justified Abortion Regulation Targets Abortion Only, the Burden Should Shift to the Government to Prove that the Regulation Actually Promotes the Interest in Women's Health.

Generally, the plaintiff bears the burden of proof, but there are many circumstances where, once the plaintiff successfully makes a certain showing, the burden properly shifts to the defendant.[82] It is generally understood that the "ultimate allocation depends on general considerations of fairness, convenience, and policy,"[83] all of which counsel a burden shift in this case. For example, the burden of proof "may be placed upon the party who contends that the more unusual event has occurred,"[84] "who

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[82] Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions--An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 Nw. U. L. Rev. 892, 896 (1982) (noting that "[t]here are exceptions to the rule that plaintiffs bear th[e] burden," one of which is that "the burden of production ... may be placed on one party if the means of proving the issue are normally within his or her knowledge"); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 255 (1988) (noting lack of overriding principle in allocating burden of proof).

[83] *See generally* Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in* Dolan v. City of Tigard, 71 N.Y.U. L. Rev. 1301 (1996); Martinez, 39 Hastings L.J. at 255.

[84] McCormick on Evidence, § 337, at 950.

seeks to establish the improbable."[85] The burden shift recognizes what is probably true and shifts the burden to the party who needs to disprove it to win the case.[86]

Health-justified regulations that single out abortion for restrictions not placed on procedures of comparable risk are in a category of regulations that *Casey* regards with skepticism and justifiably so. The medical risks of abortion can and should be regulated like the medical risks of all other procedures. As *Casey* and *Roe* before it both recognize, it is the state's interest in potential life that distinguishes abortion from other procedures, and which justifies the extra latitude the state has to regulate within the limitations of *Casey*.

As discussed above, the health interest is different from the interest in potential life in that abortion in its surgical aspects is similarly situated to other medical procedures. Because targeted health-justified regulations go beyond *Casey*'s allowance for health-justified abortion regulations comparable to those adopted for "other procedures," they bear similarities to statutes that facially discriminate on the basis of race and gender. They

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[85] *See, e.g.*, Martinez, 39 Hastings L.J.at 252–53 ("The party who seeks to establish the improbable generally is allocated the burden of proof, all other things being equal.").

[86] 1 FEDERAL EVIDENCE § 3:3 (4th ed.). In this case, the plaintiffs have provided more than sufficient evidence to carry the burden of proving that the regulation does not in fact serve the state's valid interest in health. However, the Court should clarify in its ruling that the ultimate burden on this issue in fact lies with the Defendant. J.P McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 242 (1944).

raise an inference that they are designed not to promote the valid state interest, but another impermissible interest. In equal protection clause challenges to policies that discriminate on their face on the basis of race or gender, under both strict and intermediate scrutiny, the burden of proof to justify the law despite its facial discrimination falls on the government. *United States v. Virginia,* 518 U.S. 515, 533 1996) (the burden of justification under both intermediate and strict scrutiny "is demanding and ... rests entirely on the State.").

A similar structure should apply here. If the plaintiffs bear their burden of proving that an abortion regulation justified on women's health grounds places more onerous restrictions on abortion than on medical procedures of comparable risk, they have established that it is unlikely that the regulation actually promotes women's health. The burden should shift to the government to prove the regulation actually promotes the state's valid interest in women's health. If the plaintiffs cannot prove that the health-justified abortion regulation places more onerous restrictions on abortion than comparable medical procedures, the burden remains with them to prove that nonetheless, 1) the restriction somehow still does not promote health; or 2) that the restriction has the effect of imposing a burden that is undue, that is not sufficiently justified by the benefit to health.

The same burden shift is not appropriate for *all* statutes that target abortion of course because the Supreme Court has noted that abortion can be regulated differently from other medical procedures

in the interest of potential life.[87] The plaintiff challenging a potential life-justified abortion regulation carries the burden of proving that the regulation violates *Casey*'s terms: that the means used is not designed to inform but rather to hinder the abortion, that it is false or misleading, or that is otherwise fails to respect the woman's dignity and equality, violating the balance between the woman's free choice and the state's interest in promoting life.[88] If the plaintiff cannot show that the regulation fails to serve the interest in potential life, the plaintiff could then only win by establishing that the regulation nonetheless has the effect of imposing an undue burden on the woman's choice.[89]

Burdens properly belong to the government where there are concerns about government overreach in an area, where the temptation of appeasing powerful constituents is great, and where without the burden the government could take rights away by shouting one simple word, in this case, "health!" This is the sort of situation that has led to burden shifting in other circumstances.[90]

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[87] *See supra* at I.A & I.B.

[88] *Supra* at I.

[89] See *Casey*, 505 U.S. at 878.

[90] A similar confluence of circumstances produced an actual shift in the burden of proof in Takings cases. Sprung, 71 N.Y.U. L. REV. at 1316 (internal citations omitted); *id.* ("Justice Scalia infused takings law with a concern for government overreaching that would naturally lead to a more intense examination of the government's actions."). *See also Dolan*, 512 U.S. at 393 (holding that city had not met its burden of establishing fit between burden and interest).

CONCLUSION

For the foregoing reasons, the Fifth Circuit's deferential rational basis test advocated below must be rejected and its decision overruled. Protecting women's dignity and maintaining the balance *Casey* struck requires an independent inquiry into whether and how effectively health-justified abortion regulations serve women's health.

Respectfully submitted,

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